COURT OF APPEALS.

OUR SOVEREIGN LORD THE KING,

Appellant,

and

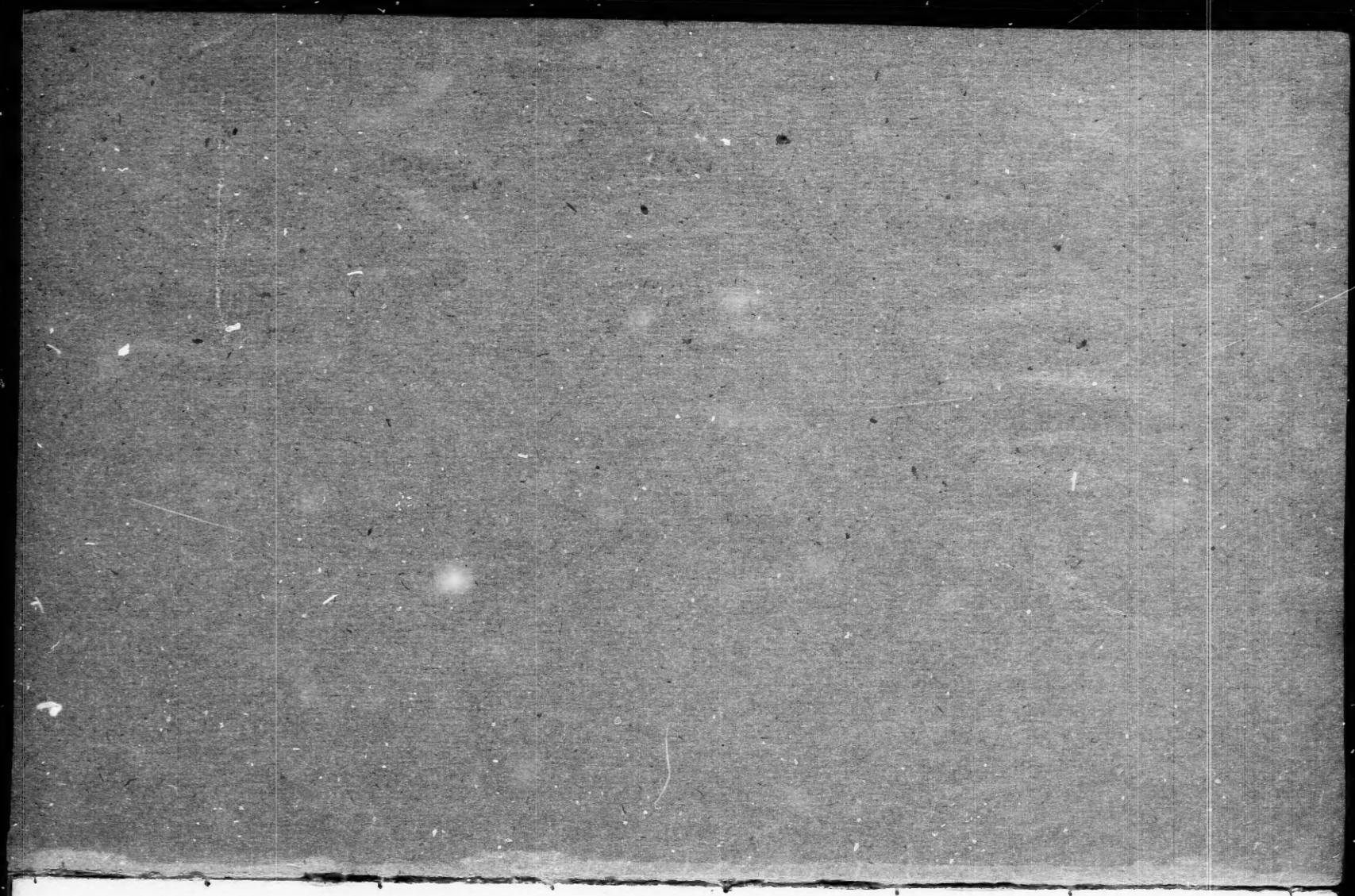
ROBERT FROSTE,

Respondent,

and

WILLIAM LINDSAY.

Case of ROBERT FROSTE, the Respondent.



COURT OF APPEALS.

PROVINCE OF LOWER-CANADA.

Court of Appeals,

Our Sovereign Lord the KING,

(Intervening party in the Court below,)

APPELLANT,

and

ROBERT FROSTE,

(Plaintiff in the Court below,)

RESPONDENT,

and

WILLIAM LINDSAY,

(Defendant in the Court below.)

The Respondent's Case.

THE present appeal is brought from a Judgment, rendered in the King's Bench at Montreal, dismissing an intervention filed by "David "Ross, Esquire, King's Counsel, for and on behalf of our Sovereign "Lord the King," in a cause wherein the Appellant was Plaintiff and one William Lindsay was Defendant, by which Judgment the intervention of the King was dismissed.

The original action was an action of revendication, instituted by the Appellant against the said William Lindsay, for the recovery of twelve bales of flannels and one bale of superfine cloths, of a large value, belonging to the Appellant and whereof the said William Lindsay had illegally possessed himself.

To this action William Lindsay pleaded the general issue, and two pleas of justification: the first plea of justification alledging that the said goods and chatteis were by the said William Lindsay, then and still being Collector of His Majesty's Customs at the Port of St. Johns, arrested, taken and seized *as good and lawful prize to our Lord the King*, for that the said goods were in the possession of persons who, contrary to their allegiance were adhering to and trading with the enemies of our Lord the King, and were then and there employed in conveying the said goods from the Province of Lower-Canada unto the United States of America, for the purpose of trade with the enemies of our Lord the King, in the said United States of America, and of affording assistance and support to the enemies of our Lord the King, whereby the same became and were forfeited as good and lawful prize to our said Lord the King, and that the same then were in the possession of the said William Lindsay as such *lawful prize*.

The second plea of justification states the seizure to have been made by one Menard Harris, one of the Officers of His Majesty's Customs, and by a party of soldiers in the service of our Lord the King. It does not differ in other respects from the preceding plea of justification.

147171

Res
AC
23
1835 Ts

Issue was joined upon these pleas.

In the mean time the Respondent obtained restitution of the property upon giving security for its appraised value.

Subsequently to the joining of issue upon the several pleas of William Lindsay, Mr. Ross obtained leave to file an intervention on the behalf of the Crown.

In this intervention it is alledged, "that on or about the 20th day of December, 1814, and long before and afterwards our Sovereign Lord the " King was at open war with the Government of the United States of " America, and being so at war, no subject of the King, an inhabitant of " this Province of Lower-Canada, had a right to export any articles " whereby the enemies of our said Lord the King could be assisted or " receive succour. That flannels and every kind of woollens were pro- " hibited and not allowed to be exported from this Province into the " United States of America. That the said Plaintiff, in defiance of the " common Law and contrary to the allegiance which he ought and was " bound to bear to our said Sovereign Lord the King, did on or about " the said 20th day of December, 1814, illegally, by circuitous roads and " paths, convey and cause to be conveyed to the Southward and beyond " the Port of St. John and towards the lines between this Province and " the United States of America, the following described goods and chat- " tels, wares and merchandize, to wit, twelve bales or packages of flan- " nels, marked, &c. and numbered respectively, &c. and one bale of " superfine cloths, marked, &c. and numbered, &c. with an intent to " trade, export or convey the same unto the United States of America, " and therewith and thereby aid and succour the Government and the " people of the United States of America, then the open enemies of our " said Lord the King, contrary to the Laws, statutes and regulations in " this behalf made and provided. By reason of which premises the said " last mentioned bales and packages were liable to be seized and for- " feited. That on the day last aforesaid, at St. John in the District " of Montreal, in the Province of Lower-Canada, the bales and packages " above and in the Plaintiff's Declaration mentioned and described, were " by the said William Lindsay, then and still being Collector of His " Majesty's Customs, at the Port of St. John, in the said District, arrest- " ed, taken and seized *as good and lawful prize*. Because at the time of " the arresting, taking and seizing thereof as aforesaid, the said bales " and packages belonged to and were the property of persons unknown, " subjects of our said Lord the King, who contrary to their allegiance " were then and there adhering to and trading with the enemies of our " said Lord the King, and were then and there employed in conveying and " causing to be conveyed the said bales and packages out of or from " the said Province of Lower-Canada into the said United States of " America, for the purpose of trading with and succouring the enemies of " our said Lord the King, to wit, the Government and people of the said " United States of America; whereby the said bales and packages became " and were forfeited *as good and lawful prize* to our said Lord the King, " and the same have since continued and now are in the possession and " custody of the said William Lindsay, as being such lawful prize as " aforesaid, to be disposed of accordingly.

" The King's Counsel prays in consequence that the said bales and " packages may, for the reasons aforesaid, be adjudged and declared such " good and lawful prize and forfeited, and that the said goods, wares and " merchandizes may be ordered to be delivered to our said Lord the

" King, the intervening party in the said cause for the benefit of our " said Lord the King, *and all others*, or that the value thereof may be " adjudged to be by the Plaintiff paid to our said Lord the King."

To this intervention the Plaintiff filed a plea of general issue.

The cause having been fixed for the adduction of evidence on the issue raised upon the intervention, five witnesses were exam[illegible] on the part of the Appellant and four witnesses on the part of the Cro[illegible]

The witnesses produced by the ~~Appellant~~ respondent are persons whom, if he had not been sensible of the unfounded nature of the charge contained in the intervention, it would have been the height of indiscretion to produce.

They are the carriers employed by him and the clerk under whose immediate superintendance the effects were, during their conveyance; men who must have known the place of destination of the effects, and who with one voice declare that it was Missisqui Bay, in this Province, and not any place in the United States of America, and who explain most satisfactorily the circumstances which *had excited* the unfounded suspicions of the officers of the Customs at St. John.

The witnesses on the part of the Crown are first, two soldiers of the late Regiment of De Meuron, who were employed to assist in making the seizure.

They prove that these effects were seized by them in this Province without any warrant whatever, but *manu militari*, the same being in the possession of the subjects of the King proceeding in their lawful occupations, from one part of the Province to another part of the Province. That the persons who were thus interrupted in their lawful avocations were but little satisfied with this exercise of military authority, and that there was reason to suspect that they would have willingly made a small pecuniary sacrifice to relieve themselves from the state of duress in which they were placed.

A third witness, Joseph Colbath, who had been a prisoner in the United States but had effected his escape, swears, that when in confinement, he overheard a conversation between some American Officers, in which it was said by them that they had no *blankets* for their men, but expected some from the North; which information he communicated to the Commanding Officer at St. John.

And this evidence is offered on the part of the Crown to shew that the Appellant, to supply this want of the King's enemies, had sent to them *flannels and superfine broad cloths*.

The parties having been heard upon the intervention and evidence, the Court below by their judgment of the 20th day of June, 1817, dismissed the intervention.

It is difficult to conceive that the Court below should have pronounced any other judgment upon this intervention.

For,

First, the demand is not brought in the name of any Public Officer, by Law authorized to bring it.

It is brought in the name of a Gentleman styling himself " King's Counsel for and on behalf of Our Sovereign Lord the King."

The King's Counsel is not an Officer of the Crown. His commission gives to him precedence but not power of Emolument.

Indeed the King could not by Law grant unto him the power of fyling an information or intervention.

1st. Because it would not be warranted by ancient usage.

2dly. Because it would abridge the office and powers of His Majesty's Attorney-General.

But supposing the demand in intervention to have been well brought by the "King's Counsel, for and on the behalf of Our Soveriegn Lord the King," it is bad—

1st. Because there is no averment that, when the goods in question were conveyed *to the Southward and beyond the Port of St. John*, our Sovereign Lord the King was at open war with the persons administering the Government of the United States of America; and because it is said only that they were so conveyed about the 20th day of December, 18- which is vague and uncertain.

2dly. Because there is in the said intervention averred as the ground of the demand, a traitorous intent in the Respondent, accompanied by an overt act, which is high treason, and cannot be tried in any civil suit or action.

3dly. Because it is not in the said intervention averred that the goods mentioned in the said intervention are the goods restitution whereof is by the Plaintiff in and by his Declaration demanded.

4thly. Because trading with the King's enemies does not, by the common or Statute Law of the Kingdom, work any forfeiture of the goods used in such trade. Such trading it may be admitted is illegal; an insurance upon the vessel employed in it or upon her cargo may be void (8. T. R. 548.) It may be a misdemeanor to carry corn to the enemy in time of war, as all the Judges said, on a reference in King William's time (1. T. R. 85.) By the Maritime Law, it may be cause of confiscation, provided the party be taken in the act. (Ib.) But this serves only to prove that there are other remedies provided for the mischief. To divest the Appellant of his goods, some known and certain rule of Law must be produced on the part of the Crown.

5thly. But if trading with the enemy does work a forfeiture of the goods used in such trade, the mere intent to trade, though accompanied by an overt act, will not work a forfeiture. The trading itself is a mere misdemeanor, the intent to trade with an overt act, is therefore no crime. In all the cases of condemnation under the Maritime Law in this matter, there has been an *actual trading*, (case of the Hoop, 1. R. A. R. 1. 196, and cases there cited.)

6thly. If these goods are liable to condemnation at all, they are so liable as prize of war, it is accordingly on this ground that their condemnation is prayed. They must then be goods taken by maritime capture, (which it is not pretended that these goods are,) or goods taken as plunder or booty in a mere continental land war. And although there is no instance in history or law, ancient or modern, of any question before any legal judicature, ever having existed about plunder or booty in the Kingdom of England, (Lord Mansfield, apud Doug. 614,) yet it is quite certain that to constitute plunder or booty, there must be a taking *from the enemy*. Now the goods in question were not taken from the enemy but from one of the King's subjects.

7thly. But if the goods be liable to confiscation as prize of war, the question of prize or no prize cannot be tried by a Court of mere Municipal Jurisdiction, such as the Court of King's Bench, at Montreal. It could only be tried by a Court conversant with and acting under the Law of Nations. Lecaux vs. Eden, (2. Doug. 594, and Lindo vs. Rodney, and another.)

8thly. But if the Court of King's Bench at Montreal could lawfully condemn these goods as prize of war, that Court could only so condemn them *during the war*. Now the intervention was fyled and the judgment of the Court pronounced after the return of peace.

Lastly. There is no evidence that these goods were conveyed from Montreal with the intent of trading with the enemy.

Quebec, 20th July, 1818.